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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-327, 82-526

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED, *et al.*,
Petitioners,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

BRIEF IN RESPONSE TO PETITIONERS' REPLY BRIEF

Respondent Board of Trade of the City of Chicago ("Board of Trade")[1] submits this brief response to two new arguments which petitioners Chicago Board Options Exchange, Inc. and Options Clearing Corporation, Inc. raise in their reply brief (filed November 15, 1982) as reasons for vacating the decision below.

1. In a one-sided review of the legislative statements accompanying the recent enactment of Pub. L. No. 97-303 (the so-called "Securities Amendments"), petitioners assert that various members of Congress thought the decisions below were in error. Pet. Reply Br. at 6. This supposed evidence of the incorrectness of the lower decisions, petitioners argue, requires this Court to vacate them. But petitioners fail to acknowledge that other members of Congress recognized that the lower court's decisions were indeed correct and that the Securities Amendments worked a fundamental change in the juris-

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[1] Pursuant to Rule 28.1 of the Rules of this Court, the Board of Trade states that it has no parent company, subsidiaries (other than wholly-owned subsidiaries), or affiliates.

dictional allocation between the SEC and the CFTC. For example, the House Committee on Agriculture, to which the Securities Amendments were referred, stated in its report accompanying these Amendments:

> [*The Seventh Circuit's*] *conclusion is consistent with the policy expressed by Congress in the past* in providing CFTC with regulatory authority over hedging and price discovery instruments and the SEC with the burden of protecting the efficiency and fairness of the capital formation market.
>
> * * *
>
> While the Committee continues to believe that this functional breakdown serves important purposes, it recognizes the pragmatic consideration that the public will be best served by ending the jurisdictional dispute between the two agencies . . . .

H.R. Rep. No. 626, Part 2, 97th Cong., 2d Sess. 2 (1982) (emphasis added). *Accord*, H.R. Rep. No. 565, Part 1, 97th Cong., 2d Sess. 40 (1982); 128 Cong. Rec. H7478 (daily ed. Sept. 23, 1982) (remarks of Rep. de la Garza, Chairman, House Committee on Agriculture). Thus, the petitioners are wrong to suggest that "Congress expressly determined to overturn" the lower court decisions because of their incorrectness. Pet. Reply Br. at 6. Rather, as indicated above, a key committee in this process manifestly believed it was overturning the former statute itself, which had been correctly interpreted by the court of appeals.

2. Petitioners also are wrong in arguing that this Court must vacate the decisions of the court of appeals because of Congress' alleged displeasure with the decisions. *See* Pet. Reply Br. at 6. Congress may always rewrite a statute, but it cannot preclude the courts from exercising the "inherently . . . judicial" task of interpreting statutes. *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). "To declare what the law is, *or has been*, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our

governments is, that the legislative power shall be separated from the judicial." *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804) (emphasis added). A practice of mechanically vacating lower court decisions in obedience to the latest congressional pronouncements would confer upon Congress the power to overrule statutory interpretations.[2] However, it was early established that the separation of powers doctrine prevents such retrospective overruling of judicial decisions. *Gordon v. United States*, 117 U.S. 697, 702-03 (1864) (published 1886); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-14 (1792).

The court of appeals correctly interpreted the relevant statutes as they stood at the time that it rendered its decisions. The Securities Amendments and the alleged purposes for their enactment do not alter the correctness of the decisions below, and certainly are no basis for this Court to vacate those decisions.

CONCLUSION

Having prevailed upon Congress to change the law and upon the SEC to issue new controlling orders, petitioners now wish to have the entire matter disappear as if it never happened—to rewrite history, so to speak. Petitioners' interest in having the court of appeals' opinion vacated springs from its possible use as a precedent in future cases.[3] Petitioners are requesting the Court to

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[2] Following petitioners' suggested procedure would in effect allow Congress to force vacation of any disagreeable judicial determination simply by amending the relevant statute while a petition for certiorari is pending. Given the Court's heavy workload, there is no room for certiorari petitions filed for the sole purpose of stalling while Congress enacts new legislation to retrospectively overturn decisions of the lower courts. *See Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) (Stevens, J., dissenting).

[3] The Board of Trade agrees the opinion probably will remain a significant precedent for construing the Commodity Exchange Act even if the proposed amendments to the CEA in H.R. 5447 are enacted. For example, the opinion below will prevent the SEC from

destroy this precedent, notwithstanding that they had a full and fair opportunity to litigate the questions involved, whereas the Board of Trade requests only that the Court remain neutral. But petitioners' cries of *Carthago delenda est* are unnecessary. Denial of certiorari does not reflect a judgment as to the merits, and if the lower court opinion is some day important as a precedent, this Court can reflect on its correctness then.

Accordingly, the Board of Trade respectfully requests that the Court deny the petitions for writ of certiorari.

Respectfully submitted,

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arguing, as it had before, that *futures* on GNMA's are not within the CFTC's exclusive jurisdiction under CEA § 2(a)(1), 7 U.S.C. § 2. Yet the opinion does not determine any of the related issues cited on pages 3-5 of petitioners' reply brief. The court of appeals carefully stated that its opinion was "limited to the particular issue presented," App. at 50 n.50, which it defined as "whether the [SEC] has authority to regulate trading in options on [GNMA's]." App. at 1. The particular horrible paraded by petitioners in their reply brief—that the court of appeals' opinion will interfere with the Federal Reserve Board's ability to set margin requirements—was also presented to the court of appeals, which responded: "This opinion is not intended to decide related questions, such as . . . whether the Federal Reserve Board may set margin requirements for options on exempted securities . . . ." App. at 50 n.50; *see also* App. at 37 n.34.